NO. 93-149

SUPREME COURT
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ROBERT D. FISH,

Petitioner

versus

JOAN MARIE COLLINGS, Et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

PETITION FOR CERTIORARI

Robert D. Fish
in Propria Personam
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79 pp

QUESTIONS PRESENTED

1. Whether Bankruptcy Rule 9011 preempts a state court malicious prosecution cause of action.

2. Whether a cause of action in malicious prosecution, accruing after termination of the underlying bankruptcy action, involving substantive state court issues, and including defendants not under the jurisdiction of bankruptcy court, is preempted by the bankruptcy code.

3. In a state court action for malicious prosecution, whether it is a violation of equal protection for the court to issue an unpublished opinion applying a standard of favorable termination which is irreconcilable with all prior published decisions.

4. Whether a plaintiff's due process rights are violated where one judge rules against him in part because he is appearing in pro per, and other judges rule against him without his having an opportunity to appear before them.

PARTIES TO THE PROCEEDING BELOW

Petitioner/Appellant

Robert D. Fish

Respondents

Joan Marie Collings

Rebecca Jane Mann

Richard McCue

Karen Anderson Holmes

Daniel B. MacLeod

Alford & MacLeod

New Hampshire Insurance Company

American International Adjustment Co. Inc.

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OPINIONS BELOW

The Order of the Court of Appeal of the State of California, Fourth Appellate District, Division One, dated January 8, 1993, which petitioner seeks to have reviewed, is attached hereto as Appendix 1. The Order of the Court of Appeal of the State of California, dated January 26, 1993, denying petitioner's motion for rehearing, is attached hereto as Appendix 2. The Order of the Supreme Court of the State of California, dated April 28, 1993, denying review the Order of the Court of Appeal, is attached hereto as Appendix 3.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, Section 1257(a) of the United States Code.

FEDERAL STATUTES AT ISSUE

The statutes and rules listed below are important to the resolution of this case. Since the text is lengthy, the statutes and rules are merely cited herein, and the full text is set forth in Appendix 4 in accordance with Sup. Ct. Rules, Rule 14(f).

U.S. Constitution, Art. VI, Clause 2

U.S. Constitution, Amendments 5, 14

11 U.S.C. § 303

11 U.S.C. § 523

28 U.S.C. § 157

28 U.S.C. § 1334

Fed. R. Civ. Pro. Rule 11

Bankruptcy Rule 9011

Rules of Professional Conduct, Rule 7-108

Code of Judicial Conduct, Cannon 3(A)(4)

STATEMENT OF THE CASE

The following facts were extracted from petitioner's opening brief in his Appeal before the Fourth District Court of Appeal. The Court of Appeal either adopted or ignored each of these facts in its Opinion (Appendix 1). Since respondents prevailed below on a demur and summary judgment, the facts are taken in the light most favorable to petitioner.

1. Respondents' Underlying State Court Action

In 1984, a single proprietor named Jim Britt hired petitioner as an independent contractor to develop

computer software and to improve certain laboratory tests. (2 Appellant's Appendix, "AA" 433).[1] Britt licensed the technology developed by petitioner to two of the respondents, Collings and Mann. (1 AA 43-53; 2 AA 433-434). Collings and Mann went into business using the technology developed by petitioner, but failed for lack of funds. (2 AA 434). Collings and Mann then filed a complaint in San Diego Superior Court against Britt, petitioner, and others for fraud and breach of contract. (1 AA 58-72; 2 AA 434).

2. Respondents' Underlying Bankruptcy Action

Petitioner was unable to fund a defense in state court and filed for Chapter 7 bankruptcy as a means of defending himself. The respondents followed petitioner into bankruptcy court by filing an adversary complaint in the bankruptcy court. The adversary bankruptcy complaint restated essentially all of the substantive liability issues originally brought in the companion state court complaint. (1 AA 39-53; 2 AA 441, 468-471). Virtually every factual allegation in both the state and bankruptcy complaints was

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[1] The references are to Appellant's Appendix in the Court of Appeal of the State of California.

false, (2 AA 434-435, 450-463, and 465-468), and when the bankruptcy action finally came to trial, the bankruptcy court granted a non-suit. (2 AA 439).

3. Petitioners' Malicious Prosecution Action

Ms. Collings admitted in deposition testimony that she knew all along that petitioner never did anything wrong. She later admitted that she had only agreed to bring the affirmative action against petitioner in the bankruptcy court because her insurance companies promised to indemnify her from liability and costs. (2 AA 435) Based in part on this information, petitioner brought an action in San Diego Superior Court for malicious prosecution against Ms. Collings, her partner, Ms. Mann, their attorneys, and two insurance companies involved in an indemnity scheme. (2 AA 436).

Petitioner's original complaint contained two causes of action, one for maliciously prosecuting the bankruptcy action, and one for maliciously prosecuting the companion state court action. (1 AA 30-38). The trial court granted a demur on the first cause of action on the grounds that it was preempted by the bankruptcy code. (1 AA 74-90). Petitioner amended his complaint, but eventually lost on

summary judgment on the grounds that the non-suit in the bankruptcy action cannot act as a favorable termination of the underlying state court action.

4. Violations of Due Process

During the proceedings petitioner was rail-roaded by the San Diego Court system. In one such instance, one of the state court judges ruled against petitioner on a motion partly because petitioner was in propria personam.

> "You're in pro per, and that also colors my judgment about what you're seeking."

(2 Reporters Transcript "RT" 2, lines 16-19, 20-21; 2 AA 435). In another instance, a judge continued the hearing on a pending motion until the following week. After petitioner had left the courtroom, the judge discussed the merits of the motion with opposing counsel, and then issued a minute order ruling against petitioner on the same matter that had been continued. (4 AA 706-707, 753, 754, lines 16-21). (5 AA 967). In another instance a judge initially decided a motion in petitioner's favor, and then changed his mind during a telephone conversation with another judge who was not even present at the hearing, and before whom

petitioner never had any opportunity to appear. (5 AA 968; 4 AA 711).

5. Subsequent Appeals

The Court of Appeal affirmed the decision of the lower court (Appendix 1 hereto) by carefully side-stepping critical, undisputed facts, and by applying a standard for "favorable termination" which was completely spurious and irreconcilable with published opinions. Significantly, the Opinion containing the spurious standards was ordered to be unpublished. Petitioner filed a Petition for Rehearing (Appendix 2 hereto), and a Petition before the California Supreme Court, but both petitions were summarily denied. (Appendix 3 hereto).

6. Stages Raising Federal Questions

The pre-emption issue was raised before the court of first instance in a demur (1 Appellant's Appendix "AA" 67-198), in petitioner's appeal to the Fourth District Court of Appeal (pages 11-20), in the subsequent reply (pages 9-15), in the request for rehearing (pages 2-8), and again in the petition for review before the California Supreme Court (pages 3-15). The due process issues were raised before the

court of first instance in a supplemental pleading re respondents' motions for summary judgment (4 AA 703-821), in petitioner's appeal to the Fourth District Court of Appeal (pages 35-38), and in the Petition to the Supreme Court (pages 15-16).

REASONS FOR ALLOWANCE OF THE WRIT

This case is important because it places California law squarely in conflict with preemption decisions of this Court, several lower federal courts, and the bankruptcy code itself. It is also important because the courts below violated petitioner's constitutional rights to equal protection and due process.

The preemption portion of the Opinion of the Court of Appeal is inconsistent with this Court's own holding in *Business Guides v. Chromatic Comm.*, 498 U.S. __, 112 L. Ed. 2d 1140, 1160, 111 S. Ct. ___ (1991), citing *Cooter & Gell*, 496 U.S. 384, 110 L. Ed. 2d 359, 110 S.Ct. 2447 (1990). In *Business Guides*, this Court expressly held that Rule 11 did not create a federal common law of malicious prosecution. The obvious corollary is that Rule 11 is not equivalent to, and cannot preempt state court malicious prosecution causes of action. In the present case, the

only federal remedy realistically available to the petitioner to redress the respondents' malicious bankruptcy complaint was Bankruptcy Rule 9011, which is an almost verbatim restatement of Rule 11. Since Rule 11 does not preempt malicious prosecution, it follows that the almost identically worded Bankruptcy Rule 9011 also cannot preempt malicious prosecution.

The Opinion of the Court of Appeal is also inconsistent with the limited subject matter jurisdiction accorded to the bankruptcy courts. Under 28 U.S.C. § 1334, jurisdiction of the bankruptcy courts is limited to matters that affect the bankruptcy estate. In the present case, petitioner's action in malicious prosecution could not possibly have affected the bankruptcy estate because it arose upon termination of the bankruptcy action, i.e. after the bankruptcy estate had already been resolved. Even if subject matter jurisdiction did exist, that jurisdiction would have been concurrent (and therefore not preemptive) because the matter would have been a non-core proceeding under 28 U.S.C. § 157. In any event, the bankruptcy court had no jurisdiction over the actions of six of the respondents because they never appeared, and could not have

been brought before the bankruptcy court because they had no effect on the bankruptcy estate.

The Opinion of the Court of Appeal is also inconsistent with several federal decisions permitting malicious prosecution actions in other areas of "exclusive" federal jurisdiction. In each of the areas of patent, securities and copyright law, the federal courts have refused to find "blanket" preemption, and have instead found preemption only where there was a clear intent of Congress to preempt the state laws. Neither the respondents nor the Courts below have ever cited any authority showing a clear intent on the part of Congress to preempt malicious prosecution actions under the circumstances found in the present case.

Finally, this petition is important because petitioner's constitutional rights have been violated. The state courts cannot be allowed to trample an individual's equal protection rights by applying spurious standards in unpublished opinions. The state courts must apply the same standards to all. The courts also cannot be allowed to violate an individual's due process rights by ruling against him without an opportunity to be heard, or in part because he is appearing in pro per.

ARGUMENT

I Preemption Cannot Possibly Apply Because The Bankruptcy Courts Have No Subject Matter Jurisdiction Over Malicious Prosecution.

The bankruptcy courts are courts of limited jurisdiction. Under 28 U.S.C § 1334, their subject matter jurisdiction extends only to cases "arising under" or "related to" Title 11. This in turn has been consistently limited in the federal courts to cases which have some "conceivable effect" on the bankruptcy estate.[2]

In the present case, petitioner's cause of action falls outside the bankruptcy court's subject matter jurisdiction because it had no conceivable effect upon the bankruptcy estate. The cause of action arose only upon the

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[2] 1 *Collier, Bankruptcy*, §3.01[1][b][vi] (15th Ed. 1992); *In re Boyer*, (BC ND NY 1988) 93 B.R. 313 (no jurisdiction to hear Chapter 7 debtor's complaint alleging deprivation of civil rights in pre-petition and post-petition state court proceedings because judgment would not affect the bankruptcy estate); *In re Malone*, (BC ED Pa 1987) 74 B.R. 315, 318-319 (no jurisdiction because no effect on the bankruptcy estate); *National City Bank v. Coopers & Lybrand*, (8th Cir. Minn 1986) 802 F.2d 990 (bankruptcy court has no jurisdiction to hear complaint where none of plaintiff's claims is based on a provision of Title 11).

termination of the underlying bankruptcy action, and therefore only after all disputes as to the disposition of the petitioner's assets had already been resolved. At that point, there was no bankruptcy estate, the jurisdiction of the bankruptcy court was exhausted, and the bankruptcy court had no jurisdiction at all.[3]

In this regard the present situation is readily distinguishable from that in *Gonzales v. Park*, (9th Cir. 1987) 830 F.2d 1033), the principal federal case to address preemption of malicious prosecution with respect to bankruptcy pleadings. In *Gonzales*, the creditor sued the debtor in state court for abuse of process during the pendency of a bankruptcy action. Preemption was required because otherwise the outcome of the state court action would have affected the disposition of the bankruptcy estate. In contrast, preemption is not required in the present case because the estate was completely resolved before the malicious prosecution cause of action arose.

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[3] *Rich v. Siegel*, (2nd Dist. 1970) 7 Cal. App. 3d 465, 479, 86 Cal. Rptr. 667; *Turner v. Erminger (In re Turner)*, (2nd Cir. 1983) 724 F.2d 338 (bankruptcy court has no jurisdiction to hear dispute over property no longer in the bankruptcy estate).

Not only does 28 U.S.C. § 1334 preclude bankruptcy jurisdiction over malicious prosecution, but section (c)(2) of the statute requires that the bankruptcy courts abstain from hearing a malicious prosecution action because it is purely a question of state law.[4] Even if petitioner were to remove the action to the bankruptcy court to avoid preemption, the bankruptcy court would merely remand the case back to the state courts.[5] Thus, the Court of Appeal effectively left petitioner without any court in which to bring his action.

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[4] *In re Texas, Ltd.*, (BC WD La 1986) 58 B.R. 700 (bankruptcy court will abstain where (1) state court has ability and integrity to determine issue (2) there is no independent ground for federal jurisdiction, (3) there is no showing of prejudice from unreasonable delay in allowing case to proceed in state forum, and (4) abstention is mandatory because bankruptcy petition was filed after effective date of 1984 Act.)

[5] *In re Micro Mart, Inc.* (BC ND Ga 1987) 72 B.R. 63 (even though 28 U.S.C. § 1334 (c) is inapplicable to removed cases, the Bankruptcy Court will remand removed cases to state court where the only issue to be resolved depends solely upon state law).

II Even If Subject Matter Jurisdiction Existed In The Bankruptcy Courts, Preemption Would Not Apply Because The Court's Jurisdiction Would Be Concurrent, Not Exclusive.

28 U.S.C. § 157 created a statutory distinction between "core proceedings" and "non-core proceedings." Under that statute the district courts and their bankruptcy units have exclusive jurisdiction over core proceedings, (which directly affect the bankruptcy estate), and concurrent, non-exclusive jurisdiction over non-core proceedings (which only indirectly affect the bankruptcy estate). Since malicious prosecution cannot affect the bankruptcy estate, it is at most a "non-core" proceeding, and gives rise to only concurrent jurisdiction. By definition, concurrent jurisdiction is insufficient to preempt state law.

III Preemption Cannot Apply To Six Of The Nine Respondents Because The Bankruptcy Court Had No Jurisdiction Over Their Actions.

The bankruptcy code establishes rights as between debtors and creditors as to the bankruptcy estate, and also governs the conduct of the attorneys who appear before the bankruptcy court. (See Rule 9011). The Code does not

address any rights or responsibilities of any other entities.[6] In the present case, respondents, Holmes, MacLeod, Hill, Alford & MacLeod, New Hampshire Insurance and AIAC, were not before the bankruptcy court in any manner, and could not have been brought before that court because they had no effect on the bankruptcy estate. The bankruptcy court therefore had no jurisdiction over their actions, and no opportunity to establish a remedy of any sort as between these entities and the petitioner which could justify preemption. *Younger v. Jensen*, (1980), 26 Cal. 3d 397, 408-409, 161 Cal. Rptr. 905, 605 P.2d 813; U.S. Constitution, Art. VI, clause 2.

IV Congress Never Intended That The Bankruptcy Code Or The Bankruptcy Rules Would Preempt Malicious Prosecution

Preemption is further inapplicable to the present case because Congress never intended to occupy the field of malicious prosecution. That lack of intent is demonstrated

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[6] *In re Verrazano Holding Corp.*, (BC ED NY 1988) 86 B.R. 755 (bankruptcy court has no jurisdiction to hear adversary proceeding against a non-debtor vendor because the outcome of the dispute would not affect the debtor's rights or estate in any manner).

by the near absence of remedies in the bankruptcy code for filing frivolous pleadings. The remedy relied upon in *Smith*[7], one of the principal citations in the Opinion below, is 11 U.S.C. § 303(i). That statute is inapplicable because it is limited to involuntary petitions, and respondents filed a complaint, not an involuntary petition. The only other specific remedy established by the bankruptcy code for remedying frivolous filings is 11 U.S.C. § 523(d). That statute is inapplicable because it provides a remedy for filing frivolous consumer debt complaints, and the "debt" alleged below was a licensing fee, not a consumer debt.

Bankruptcy Rule 9011 does provide a remedy for filing frivolous complaints, but that remedy is not preemptive because Rule 9011 is almost identical to Fed.R. Civ. Pro. Rule 11, and this Court has already determined that Rule 11 was never intended to be a federal equivalent to state law malicious prosecution. *Business Guides, Supra.*

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[7] *Gene R. Smith Corp. v. Terry's Tractor, Inc.* (1989) 209 Cal.App.3d 951.

V Preemption Is Inconsistent With Federal Law In Other Areas of "Exclusive" Federal Jurisdiction.

In analogous areas of "exclusive" federal jurisdiction, including bankruptcy and securities law, the federal courts have consistently refused to preempt malicious prosecution actions based upon substantive malicious complaints such as that involved in the present case.[8] The analogy is especially significant with respect to patent law because (1) both bankruptcy and patent matters involve areas of exclusive federal jurisdiction and areas of concurrent jurisdiction; (2) both provide for *ex parte* and adversary proceedings: and (3) both provide specific limited remedies for commencement of frivolous adversary proceedings.[9]

In copyright cases, preemption does not exist where a state court cause of action contains an "extra element"

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[8] *Handguards, Inc. v. Ethicon*, (9th Cir. 1979) 601 F.2d 986, cert. den', (1980) 444 U.S. 1025, 100 S. Ct. 688, 62 L. Ed. 2d 659; *Von Brimer v. Whirlpool Corp.*, (9th Cir. 1976) 536 F.2d 838; *Scope Ind. v. Skadden et al.*, (DC CD Cal. 1983) 576 F. Supp. 373.

[9] 28 U.S.C. §§1334, 1338); 11 Bank. Rules 1002-1019, 7001-7087; 35 U.S.C. §§111, 135; 11 Bankr. Rules 9011; Fed.R.Civ.Pro. Rule 11).

not found in the federal law.[10] The "extra element" rule applies in the present case because malicious prosecution contains an "extra element" of malice which is not present in any of the bankruptcy statutes.

In short, the California state courts are creating an irreconcilable schism in the law of preemption. On the one hand, the federal courts have held that malicious prosecution is not preempted in the exclusive federal domains of patent, securities and copyright law, at least where the malicious prosecution is based upon complaints dealing with substantive state law issues. On the other hand, the California state courts are now insisting on malicious prosecution being preempted under the very same circumstances with respect to bankruptcy law. That lack of symmetry makes no sense, and wrecks havoc with the law of preemption.

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[10] See *Harper Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 200 (2nd Cir. 1983), *rev'd on other grounds*, 471 U.S. 539, 153 S. Ct. 2218, 85 L. Ed. 2d 588 (1985).

VI The Preemption Analysis Of The Court Of Appeal Improperly Ignored Two Critical Facts.

The Court of Appeal side-stepped two critical, undisputed facts which would have rendered inapplicable its cited cases on the preemption issue. These two facts are that (1) the bankruptcy action below was initiated by an adversary non-dischargeability complaint, and (2) the bankruptcy action involved substantive state court liability issues.

In *Smith*, the court held that a malicious prosecution cause of action arising from the filing of an involuntary bankruptcy petition was preempted by 11 U.S.C. § 303(i). The ruling was consistent with existing preemption law because § 303(i) provides a specific, complete remedy for filing malicious involuntary petitions. *Smith* is inapplicable to the present case because the malicious pleading below was an adversary complaint rather than an *ex parte* involuntary petition.

In *Idell*,[11] the creditor filed an adversary complaint which dealt exclusively with the procedural issues of the debtor's alleged bad faith in transferring, removing and

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[11] *Idell v. Goodman*, (3rd Dist. 1990) 224 Cal. App. 3d 262, 273 Cal. Rptr. 605.

concealing assets from the bankruptcy trustee. *Idell* is inapplicable to the present case because the action below involved substantive issues of fraud, not merely procedural issues. The difference is reflected in the fact that the procedural issues in *Idell* were resolved by a hearing, and the substantive issues in the case below were resolved by a full blown trial. *Idell* is still further distinguishable because the court's preemption reasoning was based on the defensive nature of the complaint (*Idell*, 244 Cal. App. 3d at 268, 273). In contrast, the respondents in the present action sought affirmative relief in the form of rulings on fraud which would have been res judicata in the underlying state court action for fraud. Thus, the California Courts both misconstrued and misapplied the law of preemption.

VII Petitioner Has Been Deprived Of His Civil Rights.

A. The Courts Below Violated Petitioner's Equal Protection Rights By Applying A Spurious Standard For Favorable Termination.

The Equal Protection Clause of the Fifth Amendment to the U.S. Constitution, made applicable to the states by the Fourteenth Amendment, requires every citizen to be given equal protection under the law. This necessarily requires that the same standards be applied to every individual. In the case below, the courts violated petitioner's equal protection by applying against him, and him alone, a spurious standard for "favorable termination" which is completely inconsistent with all prior decisions.

The correct standard for "favorable termination" is whether the merits of the underlying case "tends to indicate" the innocence of the accused. *Jaffe v. Stone*, (1941) 18 Cal.2d 146. This "indicating" standard is far lower than the "clear and convincing" standard, and is even lower than the "preponderance of the evidence" standard. The difference in standard of proof is reiterated time and again in the

cases, and was even cited in the Opinion of the Court of Appeal. *Accord, Chauncey v. Niems*, (2nd Dist. 1986) 182 Cal. App. 3d 967, 977 (refers to unfavorable termination where it is "not possible" to infer guilt or innocence); *Lackner v. LaCroix*, (1979) 25 Cal. 3d 747, 159 Cal. Rptr. 693 (requires only that the underlying merits "reflect on" the innocence of the accused in order to constitute favorable termination).

Unfortunately, the Opinion of the Court of Appeal cited these cases but then went on to apply a spurious, much higher standard. The Opinion found that the Bankruptcy action was unfavorably terminated because

> "the bankruptcy discharge did not unambiguously demonstrate [petitioner] Fish was innocent of any wrongdoing."

(Opinion, page 15, lines 6-10, emphasis added). This is the wrong standard. Petitioner does not have to demonstrate his innocence "unambiguously," he only has to demonstrate that the merits of the underlying case "tended to indicate" that he was innocent. A non-suit on the merits certainly "tends to indicate" innocence.

It is extremely significant in this regard that the Court of Appeal ordered the Opinion below to remain unpublished. The Court is making up holdings out of thin air to apply to one individual, and one individual only, and trying to keep its clearly erroneous holding secret by preventing its publication. Such actions violate petitioner's right to equal protection.

B. Judge Hollywood Violated Petitioner's Due Process Rights By Ruling Against Him Partly Because He Was Appearing In Propria Personam.

On December 17, 1990, at the first hearing on a summary judgment motion, Judge Hollywood admitted in open court that he intended to rule against petitioner partly based on the fact that petitioner was appearing in propria personam, and partly based on the fact that malicious prosecution actions are disfavored. (2 Reporters Transcript "RT" 2, lines 16-19, 20-21). His exact words were:

> "You're in pro per, and that also colors my judgment about what you're seeking."

(2 RT 8, lines 19-20). This is clear evidence of bias, and is no more acceptable than if petitioner's race or religion had colored Judge Hollywood's opinions.

C. Judge McConnell Violated Petitioner's Due Process Rights By Discussing And Ruling Upon The Merits Of The Case Outside The Presence Of Petitioner.

On January 18, 1991, counsel for all sides appeared for a hearing on petitioner's motion to shorten time regarding summary judgment, and the non-insurer's motion to shorten time regarding a protective order. Shortly before the hearing, the clerk informed counsel that petitioner's motion would not be heard until the following week. Since petitioner was not opposing the non-insurer's motion, he bid the opposing counsel goodby and left the courtroom.

With petitioner absent, the respondents' attorneys then met with presiding Judge McConnell and spoke with her about petitioner's motion.[12] As a result

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[12] Respondents' subsequent brief admitted "Mr. Pflug and I appeared before Judge McConnell with respect to the protective order. In the course of that appearance, Judge McConnell inquired as to the basis for Fish's ex

of that interaction, Judge McConnell ruled against petitioner on the very motion that supposedly had been continued to the following week. Proof of the improper ruling is found in Judge McConnell's minute order which states, "Motion for SJ is denied". (5 AA 967). In so acting, the opposing counsel violated Rule 7-108 of the Rules of Professional Conduct,[13] and Judge McConnell violated Cannon 3(A)(4) of the Code of Judicial Conduct.[14] These violations effectively deprived petitioner of his due process right to be heard.

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parte application. She commented that if Fish failed to comply with the statutory requirements, it was her policy to deny the application. However, she could not rule on the issue as it was not properly before her." (Supplemental Opposition to Summary Judgment, 4 AA 703, 706, line 26 - 707, line 3).

[13] "A member of the state bar shall not directly or indirectly, in the absence of opposing counsel, communicate with or argue to a judge or judicial officer, upon the merits of a contested matter pending before such judge or judicial officer, except in open court"

[14] "A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding."

D. Judge Kapiloff Violated Petitioner's Due Process Rights By Ruling Against Him Based Upon A Telephone Conversation With A Judge Before Whom Petitioner Had No Opportunity To Appear.

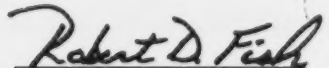
Because Judge McConnell's minute order was never disclosed to petitioner, petitioner appeared the following week before Judge Kapiloff. Judge Kapiloff initially ruled in petitioner's favor, and then called another judge on the phone to coordinate the concurrent hearing of the pending summary judgment motions. During the conversation with that other judge, Judge Kapiloff changed his mind and denied petitioner's motion. The end result was that petitioner's motion for summary judgment was off-calendared and was not heard because of statements made by a judge on the other end of a telephone, before whom petitioner never had any opportunity to appear. Once again, this violated petitioner's right to be heard.

CONCLUSION

This petition raises important and unsettled issues regarding federal preemption and bankruptcy. The issues are of national significance because of the nationwide jurisdiction of the bankruptcy courts, and because the California courts have decided a federal question in a manner that conflicts with applicable decisions of this and other federal courts. This petition has further importance in that the California courts seem intent on denying petitioner his constitutional rights, and the only court that can now remedy that situation is this United States Supreme Court. For the foregoing reasons, it is respectfully submitted that this petition be granted.

Respectfully submitted,

Dated: July 23, 1993



Petitioner in pro per
ROBERT D. FISH
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APPENDIX 1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS
COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROBERT D. FISH, Plaintiff and Appellant, v. JOAN MARIE COLLINGS et al., Defendants and Respondents.	D014345 (Super.Ct.No. 616138) **FILED** **Jan 8, 1993**

APPEAL from a judgment of the Superior Court of San Diego County, Judith L Haller, Harrison R. Hollywood, Lawrence Kapiloff, Thomas O. LaVoy, Judith D. McConnell, Jeffrey T. Miller, and James R. Milliken, Judges. Affirmed.

Plaintiff Robert D. Fish appeals a judgment favoring defendants Joan Marie Collings, Rebecca Jane Mann, Richard McCue, Karen Anderson Holmes, Daniel B. MacLeod, Lynn Potter Hills, Alford & MacLeod, New Hampshire Insurance Company (New Hampshire), and American International Adjustment Company, Inc.,

(American International) on Fish's third amended complaint for malicious prosecution and other torts.[1] Fish asserts the court erred in sustaining defendants' demurrer and granting defendants summary judgment. Fish also asserts discovery errors, misconduct by defense counsel, and judicial misconduct. We affirm the judgment.[2]

I

FACTS

For purposes of reviewing the propriety of the order sustaining defendants' demurrer and the summary

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[1] We refer to defendants Collings and Mann collectively as Collings.

We refer to defendants McCue, Holmes, MacLeod, Hill, and Alford & MacLeod collectively as the attorney defendants.

We refer to defendants New Hampshire and American International collectively as the insurer defendants.

[2] We note the record contains no judgment rendered on the order granting summary judgment favoring the insurer defendants. thus, Fish's appeal as to those defendants may technically be premature. However, because the summary judgment order disposed of all of Fish's claims against the insurer defendants, we entertain this appeal by deeming the order to incorporate a judgment. (Avila v. Standard Oil Co. (1985) 167 Cal.App.3d 441, 445.)

judgment, we state the facts in the light most favorable to Fish. (Coelho v. State Personnel Bd. (1989) 209 Cal.App.3d 968, 971; Riley v. Southwest Marine, Inc. (1988) 203 Cal.App.3d 1242, 1248.)

In 1984 Jim Britt began doing business as a sole proprietor under the name Advanced Health Associates (AHA). Britt hired Fish to develop compute software and improve various laboratory tests. Fish discussed one such test with Collings.

In October 1984 AHA and Collings entered into a "licensing, training and consulting agreement." Collings went into business in San Diego. Fish helped Collings find a business location, arranged for deliver of start-up supplies, and provided extensive training. Collings's business failed.

In June 1985 in San Diego Superior Court case number 542990 Alford & MacLeod filed a lawsuit for Collings against Fish, Britt, Advanced Health Associates, Incorporated (AHA Inc.) and others for intentional misrepresentation, negligent misrepresentation, rescission, failure to comply with franchise disclosure requirements, negligence, breach of contract, fraud and conversion.

In August 1985 AHA Inc. cross-complained against Collings for fraudulent misrepresentation, negligent misrepresentation and breach of contract. New Hampshire and its agent American International accepted tender of defense of the cross-complaint under a policy issued by New Hampshire to Collings. New Hampshire retained Alford & MacLeod to defend the cross-complaint.

In October 1986 Fish filed a voluntary bankruptcy petition under Chapter 7 in federal court.

In January 1987 on Collings' behalf Alford & MacLeod filed an adversary proceeding in Fish's bankruptcy case in an attempt to avoid discharge in bankruptcy of Collings' claims against Fish in case number 542990. In the bankruptcy adversary proceeding Collings alleged Fish obtained money from Collings by false representations, false pretenses and fraud. Collings also alleged Fish -- as the seller of a franchise or of a seller-assisted marketing plan -- fraudulently failed to disclose his financial condition. Collings sought a determination the debt Fish allegedly owed on those claims was not dischargeable in bankruptcy.

In February 1987 the bankruptcy court released Fish from all dischargeable debts. The court also entered an order granting Collings relief from the automatic stay of

proceedings in case number 542990. Later the bankruptcy court vacated its order that had allowed case number 542990 to proceed and set for hearing the issue of dischargeability.[3]

In December 1988 the bankruptcy court heard the issue of dischargeability. After hearing, the bankruptcy court dismissed Collings' adversary complaint "on the merits" and adjudged that Fish's debt to Collings was "dischargeable, and if discharge was granted debtors in this bankruptcy case, then this debt is discharged."[4]

In March 1989 Fish demanded Collings dismiss case number 542990 in light of the bankruptcy discharge or a contempt action would be pursued in bankruptcy court. A few days later at Collings' request the superior court dismissed without prejudice case number 542990 as to Fish.

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[3] Meanwhile, in August 1988 AHA Inc.'s cross-complaint against collings in case number 542990 was settled for $7,500.00.

[4] After completion of the bankruptcy adversary proceeding trial Collings told Fish she did not want to go forward with such proceeding but did so because various insurance companies promised to indemnify her against the consequences of the proceeding.

In September 1989 upon Fish's demand New Hampshire paid Fish $1,300 for costs Fish incurred in the bankruptcy adversary proceeding.

II

SUPERIOR COURT PROCEEDINGS

In September 1989 in San Diego Superior Court case number 616138 Fish complained against defendants for maliciously prosecuting the bankruptcy adversary proceeding and case number 542990. Fish alleged the bankruptcy adversary proceeding was terminated favorably to him. Fish also alleged dismissal of case number 542990 constituted a termination of that case favorable to him.

The superior court sustained without leave to amend a demurrer by Collings and the attorney defendants to Fish's cause of action for malicious prosecution of the bankruptcy adversary proceeding on the ground the matter was preempted by the United States Bankruptcy Code and within exclusive federal court jurisdiction.

In March 1990 Fish filed a third amended complaint. Fish's third amended complaint's first cause of action alleged defendants maliciously prosecuted case number 542990. Fish's second cause of action alleged the insurer defendants retained the attorney defendant to

defend Collings against the cross-complaint in case number 542990 but then negligently monitored and controlled the attorney defendants by not discovering the bankruptcy adversary pleading was filed without probable case and case number 542990's allegations of wrongdoing by Fish were false or unprovable. Fish's third case of action alleged the insurer defendants negligently funded the bankruptcy adversary proceeding and case number 542990 after settling the cross-complaint. Fish's fourth cause of action alleged New Hampshire negligently failed to prevent its agent American International from bringing or continuing malicious lawsuits against Fish. Fish's fifth cause of action alleged defendants intentionally inflicted emotional distress by prosecuting case number 542990 and continuing to prosecute that case after Fish filed his bankruptcy petition.

Collings and the attorney defendant sought summary judgment on Fish's third amended complaint, asserting dismissal of case number 542990 in accord with Fish's discharge in bankruptcy did not constitute a "favorable termination" of that case and could not support Fish's claim for malicious prosecution.

The insurer defendants also sought summary judgment on Fish's third amended complaint, asserting

Fish's malicious prosecution and intentional infliction of emotional distress causes of action lacked merit because the insurer defendants lacked any involvement in case number 542990. The insurer defendants also asserted they did not fund the prosecution of case number 542990 or the bankruptcy adversary proceeding and lacked any "special relationship" with third party claimant Fish.

On January 30, 1991, after hearing, the superior court concluded the dismissal of case number 542990 as required by Fish's bankruptcy discharge did not constitute a "favorable termination" for the purpose of maintaining a malicious prosecution action. The court granted summary judgment favoring all defendants.

Fish appeals.

III

DISCUSSION

A

DEMURRER

In sustaining without leave to amend the demurrer to Fish's alleged cause of action for malicious prosecution of the bankruptcy adversary proceeding, the superior court stated such claim "shows on its face that it is preempted by the United States Bankruptcy Code..." Citing Gene R.

Smith Corp. v. Terry's Tractor, Inc. (1989) 209 Cal.App.3d 951, the superior court also noted: "State courts are not authorized to determine whether a claim for relief under federal law and within a court's exclusive jurisdiction is proper. [¶] With respect to the first cause of action, the federal court would have exclusive jurisdiction of that matter."

Asserting Collings' pleading in the bankruptcy adversary proceeding essentially restated all of her causes of action in case number 542990, Fish contends the superior court erred in sustaining the demurrer to his cause of action for malicious prosecution of the bankruptcy adversary proceeding. However, we find no error.

"...State courts are not authorized to determine whether a person;s claim for relief under a federal law, in a federal court, and within that court's exclusive jurisdiction, is an appropriate one. Such an exercise of authority would be inconsistent with and subvert the exclusive jurisdiction of the federal court by allowing state courts to create their own standards as to when persons may properly seek relief in cases Congress has specifically precluded those courts from adjudicating.' [Citation.] (Gene R. Smith Corp. v. Terry's Tractor, Inc., supra, 209 Cal.App.3d 951,

as holding "that a debtor's causes of action for abuse of process and malicious prosecution of an involuntary bankruptcy are preempted by federal law." (Idell stated "this reasoning is equally applicable when, as here, a debtor who has filed a bankruptcy petition claims that his or her creditors improperly objected to a discharge of the debtor's fiscal obligations." (Id. at p. 270.) "Since the filing of [an] adversary proceeding to block the discharge of debts in bankruptcy is within the exclusive jurisdiction of the federal courts, and because sanctions are available to debtors when [adversary] proceedings are filed in bad faith, we conclude that this malicious prosecution action was preempted by federal law." (Id. at p. 271) "The existence of federal sanctions for the filing of frivolous and malicious bankruptcy pleadings must be read as in implicit rejection of state court remedies. The mere possibility of being sued in tort in state court remedies. The mere possibility of being sued in tort in state court, with the potential for substantial damage awards, could deter persons from exercising their rights in bankruptcy. Thus it is for Congress and the federal courts, not state courts, to decide

what incentives and penalties shall be utilized in the bankruptcy process." (Ibid.)[5]

In sum, because Fish's alleged cause of action for maliciously prosecuting the bankruptcy adversary proceeding was preempted by federal law, the superior court properly sustained without leave to amend defendants' demurrer to that asserted claim. (Idell v. Goodman, supra, 224 Cal.App.3d 262; Gene R. Smith Corp. v. Terry's Tractor, Inc., supra, 209 Cal.App.3d 951.)

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[5] In Idell v. Goodman, supra, 224 Cal.App.3d 262, the appellate court noted an adversary "proceeding objecting to a discharge is not a separate action and has no existence apart from the chapter 7 bankruptcy proceeding. Rather, its sole purpose is to provide a mechanism for a creditor to object to the discharge of his debtor's debts. [Citations.] Indeed, unless an objection is filed, the discharge ordinarily is granted forthwith. [Citations.] Moreover, unlike a cross-complainant, [an adversary proceeding] plaintiff does not obtain any affirmative relief." (Id. at pg. 272.). Here, Collings "sought only to preserve the status quo as it existed before the filing of the bankruptcy petition." (Id. at p. 275.).

B

SUMMARY JUDGMENT

1

THE LAW

"To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations]." (Bertero v. National General Corp. (1974) 13 Cal.3d 43, 50; accord Sheldon Appeal Co. v. Albert & Oliker (1989) 47 Cal.3d 863, 871-872.)

For purposes of maintaining an action for malicious prosecution, courts have adopted a definition of "favorable termination" excluding a termination facially favorable to the defendant in the underlying action that does not reflect the defendant's innocence of any actionable wrongdoing. "Termination where it is not possible to infer guilt or innocence, favorability or unfavorability, does not satisfy [the] requirement." (Chauncey v. Niems (1986) 182 Cal.App.3d 967. 977).

"It is apparent 'favorable' termination does not occur merely because a party complained against has prevailed in an underlying action. while the fact he has prevailed is an ingredient of a favorable termination, such termination must further reflect on his innocence of the alleged wrongful conduct. If the termination does not relate to the merits -- reflecting on neither innocence of nor responsibility for the alleged misconduct -- the termination is not favorable in the sense it would support a subsequent action for malicious prosecution." (Lackner v. LaCroix (1979) 25 Cal.3d 747, 751, fn. omitted.)

In Weaver v. Superior Court (1979) 95 Cal.App.3d 166, disapproved on another point in Sheldon Appeal Co. v. Albert & Oliker, supra, 47 Cal.3d at page 883, footnote 9, the appellate court stated: "The California supreme Court in Jaffe v. Stone, 18 Cal.2d 146..., provides a thoughtful discussion on the meaning of favorable termination of a prior proceeding as it relates to a malicious prosecution action: 'It is not enough,...to show that the proceeding was dismissed. the theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accursed, and coupled with the other elements of lack of probable cause and malice, estab-

lished the tort, that is, the malicious and unfounded charge of crime against an innocent person.... The same fundamental theory is applied in testing a dismissal or other termination without a complete trial on the merits. If it is of such a nature as to indicate the innocence of the accused, it is a favorable termination sufficient to satisfy the requirement. If, however, the dismissal is on technical grounds, for procedural reasons, or for any other reason not inconsistent with his guilt, it does not constitute a favorable termination.' (Id., at p. 150, italics added.)" Weaver v. Superior Court, supra, at p. 184.)[6] A favorable termination is ordinarily not recognized where "the dismissal reflects ambiguously on the merits of the action. [Citations.]" (Id. at pp. 184-185.)

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[6] In Weaver v. Superior Court, supra, 95 Cal. App. 3d 155, the appellate court noted: "'Although the original proceeding in Jaffe was criminal, the gist of the statement is equally applicable to cases, like the one at bench, where the main action is civil.' [Citation.]" (Id. at p. 184, fn. 5, italics in original.)

SUPERIOR COURT'S CONCLUSION

In granting summary judgment favoring defendants, the superior court concluded the "procedural" termination of case number 542990 did not constitute a "favorable termination" for purposes of supporting a "cause of action for malicious prosecution or the other claims that he's alleged."[7] The court stated: "[M]y view is that the underlying case was dismissed because the plaintiffs [Collings] could note meet the burden of proof in the

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[7] In addition to alleging malicious prosecution, Fish's third amended complaint contained causes of action that would fail unless Fish prevailed on his malicious prosecution claims. As noted, the second cause of action alleged the insurer defendants negligently controlled the attorney defendants' conduct in the bankruptcy proceeding and case number 542990. The third cause of action alleged after settling the cross-complaint in case number 542990 the insurer defendants negligently funded the bankruptcy proceeding and case number 542990. The fourth cause of action alleged New Hampshire acted negligently in not preventing its agent American International from maliciously prosecuting Fish. The fifth cause of action alleged defendants intentionally inflicted emotional distress by prosecuting case number 542990 and continuing to prosecute that case after Fish filed his bankruptcy petition.

bankruptcy proceeding to obtain a stay predicated on the fraud or other misconduct by clear and convincing evidence. The finding of the bankruptcy court was not that there was not fraud, but simply that the ... claimants in that case could not prove it by the burden of proof standard that was necessary, and, ... the effect of the ruling is that the plaintiffs in the state court action were not entitled to proceed because they couldn't meet their burden of proof in the bankruptcy, and the bankruptcy had the effect, by virtue of that, of discharging this claim, and they would have been... and their attorneys would have been in contempt of the bankruptcy court if they proceeded, so they dismissed their case."

3

FISH'S CONTENTIONS

Fish contends the superior court erred in granting summary judgment against him on his cause of action for malicious prosecution of case number 542990. Fish asserts dismissal of case number 542990 after discharge of his asserted debt in bankruptcy constituted a "favorable termination" of case number 542990. Fish also asserts termination of the bankruptcy adversary proceeding constituted a "favorable termination" of case number

542990 because due to extensive issue "overlap" the bankruptcy decision assertedly amounted to a ruling in his favor on the merits of the claims of fraud and franchise violations at issue in case number 542990.

4

ANALYSIS

On this record the superior court properly granted summary judgment favoring defendants. Based upon review of the transcript of the hearing in the bankruptcy adversary proceeding the superior court correctly concluded dismissal of case number 542990 -- mandated by federal statute after Fish's discharge in bankruptcy -- did not amount to a favorable termination supporting a malicious prosecution action.

After Collings rested at the hearing in the bankruptcy adversary proceeding, Fish sought dismissal of such proceeding "on the ground that upon the facts presented to the Court and the law the plaintiff [Collings] has shown no right to relief." In announcing its decision, the bankruptcy court stated "in this particular case the existence of a partnership between Mr. Britt and Mr. Fish has been talked about, has been testified about and the circumstantial evidence, if the burden of proof here were merely a

preponderance of the evidence, I don't think I'd have any difficulty saying that it's more likely Mr. Fish was a partner of Mr. Britt's than otherwise. The problem is that the standard of proof in this case is by clear and convincing evidence."[8] Noting "another problem with this case is that is...proving liability on behalf of anyone," the bankruptcy court also stated Collings did not prove "by clear and convincing evidence" her asserted losses were caused by misrepresentations by Fish or Britt. The bankruptcy court then concluded "because all of the elements of the case have not been established by clear and convincing evidence, I must decide the case for the defense."[9]

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[8] The bankruptcy court later stated "this whole question about whether or not Mr. Fish was a partner of Mr. Britt's or not, as I say...if the test were a preponderance of the evidence, there's not much question about... how I would rule on that question."

[9] The bankruptcy court noted: "I don't know exactly what clear and convincing evidence requires of me or exactly when proof rises to that level. But when I have substantial doubts as to whether or not every element of the case has been proven by the plaintiffs by clear and convincing evidence,...when I have doubts as to whether or not it has been proven, then I don't think I can find that the level of proof has risen to the clear and convincing standard."

The bankruptcy court did not try case number 542990. Instead, the bankruptcy court tried an adversary proceeding under its rules requiring Collings to establish Fish's fraud and other elements of her case by clear and convincing evidence to avoid discharge of Fish's asserted debt. Because Fish did not meet that standard, the debt was discharged. Manifestly, the bankruptcy discharge did not unambiguously demonstrate Fish was innocent of any wrongdoing with respect to the claims Collings asserted in case number 542990. (Weaver v. Superior Court, supra, 95 Cal.App.3d at pp. 184-185.) As noted, the court in the bankruptcy adversary proceeding ruled for Fish only because Collings did not present evidence sufficient to establish Fish's liability by clear and convincing evidence. Indeed, the bankruptcy court indicated it likely would have ruled against Fish under the preponderance of the evidence standard of proof -- the applicable standard if case number 542990 had proceeded to trial.

After Fish's discharge in bankruptcy, case number 542990 ultimately dismissed as required by federal law.[10]

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[10] The discharge voided any judgment determining the debtor's personal liability with respect to any discharged debt and operated as an injunction against any

However, as indicated by the transcript of the bankruptcy adversary proceeding, such dismissal was not inconsistent with Fish's culpability. In dismissing case number 542990 the superior court did not determine the lawsuit's merits or otherwise review its substance but instead simply acted in accord with Collings' request for dismissal required by the bankruptcy discharge that reflected the federal policy of forgiving debtors. thus, termination of case number 542990 was essentially "technical or procedural" rather than substantive, reflected ambiguously at most on the merits of the case, and did not constitute a "favorable termination" supporting a malicious prosecution claim. (Lackner v. LaCroix, supra, 25 Cal.3d at pp. 184-185.)

Because the dismissal of case number 542990 was legally insufficient to satisfy the "favorable termination" element of a cause of action for malicious prosecution, defendants in case number 616138 were entitled to judgment as a matter of law on Fish's malicious prosecution

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action to collect, recover or offset, any such debt as the debtor's personal liability. (11 U.S.C., § 524(a)(1) & (2).) Thus, the discharge effectively meant as a matter of federal policy Fish's debts were forgiven and Collings was precluded from pursuing her claim against Fish personally in case number 542990.

claim. Further, because Fish was unable to prevail on his malicious prosecution cause of action, defendants were also entitled to judgment as a matter of law on his derivative tort claims alleging the insurer defendants negligently monitored the attorney defendants in the bankruptcy proceeding and case number 542990, the insurer defendants negligently funded the bankruptcy adversary proceeding and case number 542990, New Hampshire negligently failed to prevent American International from maliciously prosecuting Fish, and defendants intentionally inflicted emotional distress by continuing to prosecute case number 542990.[11]

Summary judgment favoring defendants was proper.

C

DISCOVERY

Fish contends the judgment should be reversed because the superior court assertedly erred in (1) declining

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[11] To the extent the derivative causes of action alleged by Fish were based upon asserted tortious conduct by defendants involving prosecution of the bankruptcy adversary proceeding, those claims were preempted by federal law. To the extent such claims were based upon alleged torts involving the prosecution of case number 542990, they must fail because of the lack of a "favorable termination" of that case.

to compel discovery about the pleadings, contentions and proceedings in bankruptcy court, (2) declining to compel disclosure of various attorney-client communications between Collings and the attorney defendants about the process of deciding to pursue case number 542990 and the bankruptcy adversary proceedings, (3) declining to compel discovery from the insurer defendants, and (4) declining to compel Collings to organize produced documents in the manner Fish requested. However, even if there were discovery error, discussion of such error here would be unnecessary. The case was property resolved on issues of law without the need to inquire into the factual matters involved in Fish's discovery requests. Thus, in light of the preemption of his claim for malicious prosecution of the bankruptcy adversary proceeding and the lack of a favorable termination of case number, Fish is unable to show any prejudice resulting from any error in the challenged discovery rulings.

D

ALLEGED MISCONDUCT BY THE COURT AND OPPOSING COUNSEL

Fish contends the judgment should be reversed and the case transferred to Los Angeles because of asserted mis-

conduct by Judges Hollywood, McConnell and Kapiloff. Fish also alleged misconduct by defense counsel. However, Fish is unable to show any harm resulting from Judge Hollywood's asserted bias because the record discloses Judge Hollywood did not make any ruling on the merits of defendants' summary judgment motion but instead simply continued the matter to procure a transcript from the bankruptcy court. Further, Fish's claims of misconduct by Judge McConnell, Judge Kapiloff and defense counsel are based upon speculation without support in the record. Thus, Fish has not demonstrated prejudicial misconduct by opposing counsel or the court.

DISPOSITION

The judgment is affirmed.

/s/

KREMER, P.J.

WE CONCUR:

/s/

TODD, J.

/s/

HUFFMAN, J.

APPENDIX 2

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROBERT D. FISH, Plaintiff and Appellant, v. JOAN MARIE COLLINGS et al., Defendants and Respondents.	D014345 (Super.Ct.No. 616138) **FILED** **Jan 26, 1993**

THE COURT:

The petition for rehearing is denied.

/s/

KREMER, P.J.

Copies to: All parties

APPENDIX 3

Fourth Appellate District,
Division One, No. D014345
S031226

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

ROBERT D. FISH, Appellant

v.

JOAN MARIE COLLINGS Et Al., Respondents

Appellant's petition for review DENIED.

SUPREME COURT
F I L E D
APR 28, 1993
Robert Wandruff Clerk

/s/ (LUCAS)
Chief Justice

APPENDIX 4

U.S. Constitution

Article VI. Cause 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the Untied States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Constitution

5th Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without the due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution

14th Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

11 U.S.C. § 303(i)
INVOLUNTARY CASES

(i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this sub section, the court may grant judgment--

(1) against the petitioners and in favor of the debtor for--

(A) costs;

(B) a reasonable attorney's fee; or

(C) any damages proximately caused by the taking of possession of the debtor's property by a trustee appointed under subsection (g) of this section or section 1104 of this title; or

(2) against any petitioner that filed the petition in bad faith, for--

(A) any damages proximately caused by such filing; or

(B) punitive damages.

11 U.S.C. § 523(d)
EXCEPTIONS TO DISCHARGE

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified except that the court shall not award such costs and fees if special circumstances would make the award unjust.

11 U.S.C. § 157

PROCEDURES

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11shall be referred to the bankruptcy judges for the district.

(b) (1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11 or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to-

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful

death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmation of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the dale of property other than property resulting from claims

brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending or in the district court in the district in

which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c) (1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a

party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

28 U.S.C. § 1334

BANKRUPTCY CASES AND PROCEEDINGS

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdictions on a court or courts other than the district courts, the district shall have original but not exclusive jurisdiction of all civil proceedings arising under title 1, or arising in or related to cases under title 11.

(c) (1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title

11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located of the debtor as of the exclusive jurisdiction of all of the property wherever located of the debtor as of the commencement of such case, and of property of the estate.

FED. R. CIV. PRO., RULE 11

Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or

to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

11 BANKRUPTCY RULE 9011
SIGNING AND VERIFICATION OF PAPERS

(a) Signature. Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney, except a list, schedule or statement, or amendments thereto, shall be signed by at least one attorney or record in the attorney's individual name, whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state the party's address and telephone number. The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person

whose signature is required. If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party pr parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

(b) Verification. Except as otherwise specifically provided by these rules, papers filed in a case under the Code need not be verified. Whenever verification is required by these rules, an unsworn declaration as provided in 28 U.S.C. § 1746 satisfies the requirement of verification.

(c) Copies of signed or verified papers. When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.

CAL. RULES OF PROFESSIONAL CONDUCT

RULE 7-108(B)

(B) A member of the State Bar shall not directly or indirectly, in the absence of opposing counsel, communicate with or argue to a judge or judicial officer, upon the merits of a contested matter pending before such judge or judicial officer, except in open court; nor shall he, without furnishing opposing counsel with a copy thereof, address a written communication to a judge or judicial officer concerning the merits of a contested matter pending before such judge or judicial officer. The rule shall not apply to ex parte matters.

CAL. CODE OF JUDICIAL CONDUCT

CANNON 3(A)(4)

A. Adjudicative Responsibilities

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

Supreme Court, U.
FILED
AUG 5 1993
OFFICE OF THE CLERK

No. 93-149

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1993

ROBERT D. FISH,

Petitioner,

vs.

JOAN MARIE COLLINGS, *et al*,

Respondents.

OPPOSITION

TO

PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

Petitioner's complaint set forth two malicious prosecution claims against Respondents. Both claims were dismissed by the trial court. Dismissal of the first claim followed an order sustaining the respondents demurrer, and the second was entered after the court granted respondents' motions for summary judgment. The California Court of Appeal, Fourth Appellate District, affirmed. The California Supreme Court denied review.

REASONS FOR DENYING THE PETITION

The petitioner, Robert Fish, attempted to plead two claims against the Respondents. Both claims were predicated upon the California law defining the judicially disfavored tort of malicious prosecution.

The first claim was that the Respondents "maliciously prosecuted" an action in the United States Bankruptcy Court objecting to the discharge of an obligation of Robert Fish. The trial court sustained a demurrer to this claim. Using the vocabulary of preemption, the California Court of Appeal determined

as a matter of California law and public policy that the California courts would not concern themselves with the efforts of a litigant in a federal court to obtain vindication of a right or privilege granted by federal law. To the extent that any such action is taken for an improper or illegal purpose, the courts of California leave the parties to whatever remedy may be available from the federal judiciary under federal law.

The second claim was that the respondents "maliciously prosecuted" an action in the Superior Court of California. It was the underlying claim in this action which the respondents hade sought to avoid having discharged when Mr. Fish filed his petition under Chapter 7 of the Bankruptcy Code.

The trial court granted summary judgment in favor of the respondents reasoning that a discharge in bankruptcy did not provide the required predicate for the tort of malicious prosecution under California law. Defining the "favorable termination" necessary to form the basis for a malicious prosecution action is purely a question of state law. The court of appeal held a discharge in bankruptcy does not provide the required

prerequisite as it is a "technical or procedural" termination of the preceeding action, not one unambiguously demonstrating the absence of probable cause to initiate the action. *(Petition, Appendix 1 at p. 46)*.

In short, there is no *bona fide* basis for review by this court. The purported federal issues are illusory. The issues are those of California law upon which there has been a full review by the courts of California.

CONCLUSION

The petition, although couched in a constitutional veil, really asks the court to review questions of California law decided by the California courts.

The petition for certiorari should be denied.

Respectfully submitted,
ALFORD & MACLEOD

by: _____
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Attorney for Respondents,
Joan Collings, Rebecca Mann,
Richard McCue, Karen Holmes,
Daniel B. MacLeod, and
Alford & MacLeod

Supreme Court, U.S.
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No. 93-149

IN THE
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ROBERT D. FISH,

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OPPOSITION TO PETITION FOR CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondents New Hampshire Insurance Company[1] and American International Adjustment Company, Inc.[2]

---

1 New Hampshire Insurance Company is a corporation. Pursuant to Supreme Court Rule 29.1, the following is a list of parent companies and subsidiaries (except wholly owned subsidiaries): New Hampshire Insurance Company's parent companies are NHIG Holding Corp., American International Group, Inc. and C.V. Starr & Co., Inc. New Hampshire's subsidiaries that are not wholly owned include United Guaranty Corporation, AIG Europe, S.A., and Seesam International Insurance Company, Ltd.

2 American International Adjustment Company, Inc. is a corporation. Pursuant to Supreme Court Rule 29.1, the following is a list of parent companies and subsidiaries (except wholly owned subsidiaries): American International Adjustment Company Inc.'s parent companies are

respectfully request that the Petition for Writ of Certiorari of Robert D. Fish be denied.

INTRODUCTION

Petitioner has not shown that the issues resolved by the Fourth District Court of Appeal of the State of California in its unpublished opinion involve any conflict in the courts or involve important questions of law such that this Court should exercise its discretionary power of review.

The Petition merely echoes those issues and arguments already fully addressed by the California Court of Appeal in its written opinion, which was denied review by the California Supreme Court.

Despite petitioner's assertions to the contrary, no new or important federal issue is presented by his Petition to this Court. As such, the Petition should be denied.

American International Group, Inc. and C.V. Starr & Co., Inc. All subsidiaries of American International Adjustment Company, Inc. are wholly owned.

STATEMENT OF THE CASE

In an underlying state court action, respondents filed a complaint against petitioner for, among other things, fraud. Petitioner filed for bankruptcy, in part to discharge the claims that were the subject of respondents' state court action. Respondents filed an adversary proceeding in bankruptcy court, asserting that petitioner's filing was fraudulent. However, the bankruptcy court discharged petitioner's debts, whereupon respondents then dismissed the state court action.

Thereafter, petitioner instituted a new action against respondents alleging two claims of malicious prosecution. Petitioner asserted that the filing of both the state court fraud action and the adversary proceeding in bankruptcy were tortious. The claim regarding the bankruptcy proceeding was disposed of by way of respondents' demurrers. The claim regarding the state court action was disposed of by respondents' motions for summary judgment.

In its written opinion, the California Court of Appeal, Fourth Appellate District, affirmed the trial court's rulings. Subsequently, the California Supreme Court denied review. Petitioner then filed his Writ Petition in this Court.

REASONS FOR DENYING THE PETITION

This Court should deny the Petition for a Writ of Certiorari to review the decision of the California Court of Appeal, and the subsequent denial of review by the California Supreme Court, because the petition does not present "special and important reasons" for the discretionary granting of review pursuant to Supreme Court Rule 10.

Under Supreme Court Rule 10.1(b) and (c), review may be granted when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals, or when a state court has decided an important question of federal law which has not been,

but should be, settled by the Supreme Court, or has decided a federal question in a way that conflicts with applicable decisions of the Supreme Court.

As none of these situations is present in the instant case, review should be denied.

1. Petitioner's Preemption Argument Contradicts Well Settled California Law Defining And Construing The Common Law Elements Of A Cause Of Action For Malicious Prosecution. No Important Federal Question Is Presented By The Writ Petition.

According to California law, the common law tort of malicious prosecution lies where a defendant files a lawsuit that is initiated with malice and without probable cause, and results in a favorable termination for the plaintiff. Bertero v. National General Corp., 13 Cal.3d 43, 50 (1974).

Under California construction, the "favorable termination" must be based on the merits of the prior action. A termination is only favorable when it reflects the innocence or lack of culpability of the accused party. A dismissal on technical or procedural grounds is not a favorable termination. Warren v. Wasserman, Comden & Casselman, 220 Cal.App.3d 1297 (1990). Moreover, where the dismissal reflects ambiguously on the merits of the action, a favorable termination will not be recognized. Weaver v. Superior Court, 95 Cal.App.3d 166 (1979) (disapproved on other grounds in Sheldon Appeal Co. v. Albert & Oliker, 47 Cal.3d 863, 883, fn. 9 (1989).).

Here, in order to escape liability in respondents' state court action, petitioner sought to discharge respondents' claims against him in bankruptcy. Although respondents filed an adversary proceeding in the bankruptcy action, the subject debts were eventually discharged. With the discharge of these debts, respondents then dismissed their state action against petitioner. However, the resulting dismissal as a result of the

bankruptcy findings does not constitute a favorable termination on the merits such that petitioner's innocence was unambiguously demonstrated.[3]

The California appellate court refused to find that petitioner's circumvention of liability in respondents' original state court action (by virtue of the successful discharge and dismissal in bankruptcy) was a "favorable termination" such that he could pursue a claim for malicious prosecution against those who initially sued him. Petitioner's claim that a "spurious" standard was imposed on him in the courts below has no merit, for the record

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3 In fact, in the 1987 adversary bankruptcy proceeding, the court held respondents to a "clear and convincing" burden of proof instead of a "preponderance of the evidence" burden. This ruling was made prior to this Court's holding in Grogan v. Garner, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991), in which this Court ruled the "preponderance" burden was the proper standard of proof for dischargeability exceptions.

clearly shows that the appellate court found that petitioner's lack of culpability was not unambiguously demonstrated, and was therefore a technical or procedural victory at best.

Petitioner now requests this Court to interpret California law to determine whether his case for malicious prosecution should have remained viable. Petitioner fails to recognize that reinterpretation of state construction of state common law, when no important federal question is at stake, is not a viable ground for granting review pursuant to Supreme Court Rule 10. Therefore, the Petition should be denied.

2. Petitioner's Equal Protection Arguments Are Without Merit.

Petitioner argues that his equal protection rights were violated because the California appellate court allegedly purposefully and secretly failed to publish its opinion applying a different standard to him than to other

litigants prosecuting a cause of action for malicious prosecution.

As discussed above, the proper legal standard was applied. Moreover, the court is free to determine which cases it deems significant for publication, which, petitioner's paranoia aside, results in no violation of equal protection.

3. Petitioner's Due Process Arguments Regarding His *In Pro Per* Status Are Meritless. Furthermore, The Petition Misstates Both The Facts And The Law In The Underlying Action.

Petitioner argues that his due process rights were violated because he was allegedly prejudiced due to his *in propria persona* status.[4] Specifically, petitioner argues that

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[4] Petitioner fails to point out to this Court that he is a licensed California attorney as well as a registered patent

the California judiciary "railroaded" him out of the courts. This assertion, while untrue, has been raised by petitioner before. The California Court of Appeal found this argument to be without factual and legal support, and expressed this in its written opinion.[5] This Court should not spend unnecessary time giving further credence to petitioner's contentions, and the Petition should be denied.

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attorney who is currently practicing in Los Angeles with the firm of Lyon & Lyon.

[5] See Appendix 1 to Writ Petition, for the Court of Appeal's opinion, at pages 48-49, under heading D, wherein the court stated that Fish's claims of misconduct by the California judiciary were "based upon speculation without support in the record."

CONCLUSION

The Petition for Writ of Certiorari is petitioner's attempt to have a "fourth bite of the apple." Although petitioner may be unhappy with the adverse rulings taken against him by the California courts, no important federal issues are presented by the Petition.

Therefore, the Petition for Certiorari should be denied.

Respectfully submitted,

_____

James A. Murphy and MURTAUGH, MILLER, MEYER & NELSON, Attorneys for respondents New Hampshire Insurance Company and American International Adjustment Company, Inc.

SEP 1 1993

NO. 93-149

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ROBERT D. FISH,

Petitioner

versus

JOAN MARIE COLLINGS, Et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

CONSOLIDATED REPLY TO OPPOSITIONS ON PETITION FOR CERTIORARI

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ARGUMENT

1. A VIABLE PREEMPTION ISSUE EXISTS BECAUSE PETITIONER PREVAILED IN A NON-SUIT, ON THE MERITS, AFTER A FULL-BLOWN TRIAL OF THE FRAUD ISSUES.

The respondents' entire argument with respect to preemption is that the issue does not exist. In the respondents' distorted view, the Petitioner perpetrated a fraud, he escaped liability by declaring bankruptcy, the fraud issues were mooted on the technical or procedural grounds of discharge, and petitioner's malicious prosecution causes of action were thereby rendered inapplicable regardless of the law on preemption. Such arguments sound nice, but only because the respondents leave out two critical, undisputed facts.

The first critical fact is that the fraud charges against petitioner were resolved on the merits, in a full-blown, two day trial. (See Petition For Review, pages 18-19). They were most definitely not resolved on "technical" or "procedural" grounds as implied in

the respondents' opposition briefs. The inescapable consequences of trial on the merits are that (a) the respondents' bankruptcy action (the subject of petitioner's first cause of action), was "favorably terminated," and (b) the demurrer which eliminated that cause of action was based on the federal law of preemption, and not on some technicality in the state law of malicious prosecution.

Indeed, preemption was the only argument raised with respect to the petitioner's first cause of action in the respondents' Points and Authorities supporting the demurrer (1 AA 84-85), and the transcript of the hearing on the demurrer shows that the court based its ruling exclusively on preemption. (1 Reporters Transcript "RT", page 3). Thus, preemption is clearly at issue on review, and the respondents' arguments to the contrary are supported by nothing but sophistry. The respondents' arguments are merely an audacious attempt to deceive this Court, and thereby avoid review of what the respondents know are completely erroneous rulings.

The second critical fact ignored by the respondents is that the petitioner prevailed on the

fraud issues in a non-suit, not under the normal bankruptcy standard of "clear and convincing" evidence, as implied in the respondents' briefs. By definition, a federal non-suit means that the respondents failed to present even a prima facie case of fraud. Fed. R. Civ. Proc. Rule 41(b); *White v. Abrams*, (9th Cir. 1974), 495 F.2d 724, 729. The non-suit also means that even if the fraud charges had been tried in the state court, using preponderance of the evidence as the standard of proof, the petitioner would still have prevailed because the respondents could not even muster a prima facie case. It is true that the respondents were required to dismiss the state case in light of the bankruptcy discharge, but the non-dischargeability action was based exclusively on allegations of fraud, and the non-suit conclusively determined petitioner's innocence of fraud for all purposes. The state courts, which are supposed to look behind the technicalities, were required to consider the dismissal as a favorable termination.

In short, while petitioner's position is based squarely on the application of federal statute and federal case law to undisputed facts, the

respondents' arguments are based on readily distinguishable state cases, and avoidance of the facts. The respondents' opposition briefs follow the lead of the Court of Appeal, and do not even mention the words "trial" or "non-suit". They certainly do not address any of the legal consequences of the fact that petitioner prevailed on a non-suit, after a full trial. Similarly, the respondents' opposition briefs do not even attempt to distinguish petitioner's citation of this Court's own holding in *Business Guides v. Chromatic Comm.*, 498 U.S. __, 112 L. Ed. 2d 1140, 1160, 111 S. Ct. ___ (1991).

This is absurd. Do the respondents really think that mere avoidance of the facts and the law can fool the highest court in the land? The only plausible explanation for the respondents' pathetic briefs is that they have no viable counter-arguments. Their best bet is to ignore the facts, ignore the issues, and hope that this Court's heavy calendar will prevent review.

Perhaps it should come as no surprise that the respondents are attempting to deceive this Court through misrepresentation of the facts and silence on

the federal law. After all, both the San Diego Superior and Appellate courts were perfectly willing to ignore critical facts and binding authority. Neither the respondents nor the courts below ever even addressed the bankruptcy jurisdictional statutes. Doing so would have necessitated the conclusion that subject matter jurisdiction over malicious prosecution is either non-existent or at most concurrent in the bankruptcy courts. Neither the respondents nor the courts below ever even addressed the fact that only three of the nine respondents were before the bankruptcy court, and that preemption could not possibly have applied to the other six. Yet again, neither the respondents nor the courts below ever even addressed the intent of Congress in establishing the limited jurisdiction of the bankruptcy courts, or the obvious inconsistency of the holdings below with patent, securities and copyright law.

All of these issues were raised repeatedly by respondent, and were systematically ignored. Has our country really devolved to the point that well-connected parties can prevail simply by ignoring the relevant facts and the binding authority, or that

review by the U.S. Supreme Court can be avoided with the ridiculous argument that a demurrer decided exclusively on the basis of preemption does not fairly raise the issue of preemption?

2. THE EQUAL PROTECTION AND DUE-PROCESS ARGUMENTS ARE UNQUESTIONABLY SUPPORTED BY THE RECORD.

It is repugnant to any notion of justice that respondents are attempting to avoid review by dismissing petitioner's equal protection arguments as mere paranoia. The Petition For Review went into considerable detail to demonstrate that the standard of favorable termination applied against the petitioner was spurious, and had never before been applied to anyone else. The respondents could have obliterated petitioner's argument by providing even one case citation, or even one law review article in support of the rulings below. But they didn't because they can't. The simple fact is that there is no support, anywhere, in any authority, for the injustice visited upon the

petitioner by the San Diego trial court and the San Diego-based Court of Appeal.

The Opinion below is simply wrong, and petitioner was "railroaded" by the courts. Neither of the opposition briefs offered any substantive analysis to support the unconstitutional actions of the courts below, for the obvious reason that there are no reasonable arguments to be made in their favor. The insurer's opposition brief makes a quick stab at the pro per issue, but fails to present even one single fact in support of the argument. The entire "analysis" is based on the Court of Appeal's dicta that petitioner's allegations are speculative and "without support in the record." Such a conclusion is clearly erroneous. In his Petition, the respondent gave specific, indisputable evidence, quoted directly from the record, to show that Judge Hollywood's ruling against petitioner was colored by petitioner's status as a pro per litigant. Judge Hollywood's exact words were:

> "You're in pro per, and that also colors my judgment about what you're seeking."

(2 RT 2, lines 16-19, 20-21). This is hard evidence of unconstitutional bias, and in the complete absence of any substantive argument to the contrary, petitioner deserves at least the chance to demonstrate violation of his constitutional rights.

Moreover, the respondents' briefs are completely silent on the worst violations of petitioner's due process rights. Using specific, undisputed evidence directly from the record, the petitioner proved that judge McConnell ruled against petitioner secretly, and without giving him an opportunity to appear (see Petition, pages 23-24), and that Judge Kapiloff ruled against petitioner based upon a telephone conversation with a judge before whom petitioner never had an opportunity to appear (see Petition, page 25). These issues were raised consistently in the pleadings below, and the respondents had ample opportunity in their latest briefs to argue the facts in their favor.

But once again the respondents didn't even address the issues. There simply are no good counter-arguments to blatant violations of due process, where the court records themselves evidence the violations.

The plain fact is that petitioner's due process rights have been repeatedly violated, and the San Diego courts could not bring themselves to rain justice upon individuals wielding local political clout.[1] The net effect is that an individual who was maliciously charged with fraud in both federal and state courts, and who prevailed in a non-suit against the fraud charges, has been completely precluded by unconstitutional behavior of the courts from obtaining any damages. The respondents did not, and cannot dispute these facts.

CONCLUSION

The petitioner has gone to considerable lengths in his Petition to present the facts and the law in a well reasoned, well supported manner. The respondents and the courts below have done just the opposite. They have completely ignored two critical facts, and they have completely ignored all of the federal law on

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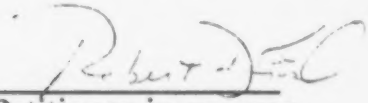
[1] One of the defendants is the son of a San Diego federal judge, and another is a past commodore of the San Diego Yacht Club.

preemption. The opposition briefs filed before this Court are a joke, failing to address in any substantive manner any of petitioner's arguments. The inconsistent state and federal holdings raised in the petition regarding bankruptcy and preemption are matters which only this Court can resolve, and the constitutional violations by the lower court are perhaps the sine qua non of this Court's very existence. Failure to grant this petition would constitute a great dis-service to this nation.

Respectfully submitted,

Dated: October 31, 1993



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